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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1935

No. 710

PAUL V. McNUTT, Governor of the State of Indiana; PHILIP LUTZ, Attorney General of Indiana; RICHARD A. McKINLEY, Director of The Department of Financial Institutions of the State of Indiana; OSCAR P. WELBORN, HARVEY B. HARTSOCK, C. M. SETSER, MYRON GRAY and ROBERT BATTON, Members of the Commission of Financial Institutions of the State of Indiana; HERBERT M. SPENCER, Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana,

Appellants,

v.

McHENRY CHEVROLET CO., INC.,

Appellee.

## MEMORANDUM RE JURISDICTION

JOHN THOMAS SMITH,
PHILLIP W. HABERMAN,
DUANE R. DILLS,
ANTHONY J. RUSSO,
STANLEY B. ECKER,
PAUL Y. DAVIS,
Counsel for Appellee.

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HERBERT M. SPENCER, Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana,
*Appellants,*

*v.*

MCHENRY CHEVROLET CO., INC.,
*Appellee.*

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## MEMORANDUM RE JURISDICTION

### I

**THE RECORD ESTABLISHES THAT THE MATTER IN CONTROVERSY EXCEEDS, EXCLUSIVE OF INTEREST AND COSTS, THE SUM OR VALUE OF $3,000.**

**A. Although Defendants denied the allegation in the complaint that the matter in controversy exceeds the sum of $3,000 in value, the Record is barren of any evidence in support of their denial: Defendants, therefore, failed to sustain the burden, which is theirs, of defeating jurisdiction.**

The Complaint alleges, in paragraph Second, that the matter in controversy exceeds the sum of $3,000 in value,

exclusive of interest and costs (McHenry Record, p. 2). Appellants denied this allegation (McHenry Record, p. 32).

In support of the general jurisdictional allegation Appellee alleged the following specific facts which were either included in the Special Findings of Fact or not questioned by Appellants (paragraphs Third, Fifth, Twelfth, McHenry Record, pp. 2, 3, 6 and 7 and Findings 1, 2 and 3, McHenry Record, pp. 47-49): The net worth of Appellee's business is in excess of $3,000; it has on hand 22 new cars and 29 used cars having a combined value of approximately $16,000; in the five months expiring May 31, 1935, it sold 481 new and used automobiles the aggregate retail prices of which amounted to approximately $164,000; a substantial majority—about 65% during the first five months of 1935—of its sales consisted of instalment or time sales; based on orders and prospects on hand and other criteria commonly employed to forecast future sales, it expects to sell approximately 330 cars in June and July of 1935 and 495 cars during the second six months of the year 1935.

In further support of the general jurisdictional allegation the Complaint proceeds in paragraphs Thirteenth and Fourteenth (McHenry Record, pp. 7-8) to set forth the following allegations, all of which were supported by evidence introduced by Appellee in the Trial Court: That the present and future earnings of Complainant and the conduct of its business will be rendered uncertain by reason of the risk involved in making future commitments for the purchase of automobiles and the inability to obtain future commitments not only for resale of such automobiles, *but also commitments for the $16,000 of cars on hand;* that Appellee will be unable to obtain commitments for the sale of retail instalment contracts covering the $16,000 of cars on

hand, as well as cars which might be ordered, either to G. M. A. C., or any other finance company; that Appellee will be restricted in selling its instalment contracts to those parties only who may be able to receive a license from the Department of Financial Institutions; that Appellee will be required to discontinue the use of forms and contracts presently in use, to prepare and use new contract forms, and to mail statements to retail buyers and any endorsers and guarantors of retail buyers and insurance policies or certificates to retail buyers, as required by Sections 4 and 5 of the Act; that Appellee will be restricted in selling its instalment contracts as to the amount which it may receive out of the "finance charge" received from retail buyers under instalment sale contracts, and in the amount of such "finance charge" which Appellee may receive upon selling such contracts *with recourse* or pursuant to a repurchase agreement, as contrasted with the amount which it may receive upon the sale of such contracts *without recourse* (Section 10 of the Act; Record pp. 16-17)—thereby depriving Appellee of the right to sell its paper for a higher price, by pledging its own credit in support of the integrity of the paper, in view of the mandate of the statute that contracts may not be sold at a higher price if sold *with recourse* or with a repurchase contract than if sold *without recourse*, and discriminating against McHenry Chevrolet Co. Inc. which sells its paper to G. M. A. C. supported by its repurchase agreement (Record, pp. 52-54), and in favor of those retail sellers who sell their paper without recourse (Record, pp. 63-64); that Appellee will be restricted in the sale of its retail instalment contracts by reason of the effect of Section 15-d of the Act (Record, p. 20) in fixing the minimum amount which may be paid for such contracts by

G. M. A. C. or any other finance company; that Appellee will be subject to severe penalties for *any* violation of the provisions of the Act and to a multiplicity of prosecutions therefor, the Act providing for a penalty of not more than $1,000 or imprisonment for not more than one year or both, upon conviction for each such violation (Section 29 of the Act; Record, p. 47).

Although Appellants denied the allegations of paragraph 2 of the Complaint, the record shows no evidence in support of this denial or of any of the allegations referred to in the last preceding paragraph of this Memorandum; on the other hand, the findings of fact *support* the jurisdictional allegations (McHenry Findings Nos. 1, 2 and 3, Record, pp. 47-49).

This Court has held that where an allegation of the jurisdictional amount is challenged, the burden of proving the lack of jurisdiction rests upon the parties challenging the jurisdiction. Thus in *Hunt* v. *N. Y. Cotton Exchange*, 205 U. S. 322, this Court said at page 333:

> "On the issue presented by the plea the burden of proof was upon the appellant (the defendant below) and he was required to establish by a preponderance of the evidence that the amount involved was less than the jurisdictional amount."

To the same effect, see:

*Healy* v. *Ratta*, 292 U. S. 263.

**B. The record establishes that the value of the business of the Complainant is in excess of $3,000; the jurisdictional requirement is therefore met under the test laid down by the decisions of this Court.**

The complaint alleges that the net worth of the Complainant's business is in excess of $3,000 (Complaint paragraph Twelfth; McHenry Record, pp. 6-7), and the findings of fact (McHenry Finding No. 2, Record, p. 49) support this allegation. The finding in question reads as follows:

> "During the time it has been in said business, complainant has sold approximately 1,200 automobiles, new and used, of which 481 were sold by it during the first five months of the year 1935, in the aggregate retail price of approximately $164,000. Based on orders and sales prospects, complainant expects to sell approximately 495 cars in the period of six months expiring at the close of the year 1935. The net worth of the business of complainant is in excess of $3,000.00."

This Court has held that jurisdiction is to be tested by the value of the object or right to be protected against interference, regardless of the financial injury which might be inflicted upon the Complainant by interference with that object or right, and regardless of whether the interference arises from the acts of private parties or the acts of officers of a State. It is the value of the business and the rights of property inherent in the business the interference with which Complainant is seeking to have enjoined which tests the sufficiency of the jurisdictional averment, and since the Record in this case establishes without contradiction that

the value of Complainant's business exceeds the sum of $50,000 and that such business will be materially affected, restricted or even suppressed through enforcement of the Act, it follows, on this test, that the jurisdictional requirement has been fulfilled.

The cases in point are the following:

*Healy* v. *Ratta,* 292 U. S. 263;
*Hunt* v. *New York Cotton Exchange,* 205 U. S. 322;
*Glenwood Light Co.* v. *Mutual Light Co.,* 239 U. S. 121;
*Berryman* v. *Whitman College,* 222 U. S. 334;
*Bitterman* v. *Louisville & Nashville R. Co.,* 207 U. S. 205.

In the case at bar the relief sought is an injunction against the interference with Appellee's business which will result from the enforcement of a state statute alleged to deprive Appellee of its property without due process of law. As stated by this Court in *Glenwood Light Co.* v. *Mutual Light Co., supra,* at page 126:

> "Complainant sets up a right to maintain and operate its plant and conduct its business free from wrongful interference by defendant. This right is alleged to be of a value in excess of the jurisdictional amount, and at the hearing no question seems to have been made but that it has such value. The relief sought is the protection of that right, now and in the future, and the value of that protection is determinative of the jurisdiction."

Similarly in the case of *Healy* v. *Ratta, supra,* this Court said, at page 269:

> "Where a challenged statute commands the suppression or restriction of a business without reference to the payment of any tax, the right to do the business, or the injury to it, is the matter in controversy."

In the case of *Bitterman* v. *Louisville & Nashville R. Co.*, 207 U. S. 205, the same principle was enunciated by this Court, which said at page 225:

> "Besides the substantial character of the jurisdictional averment in the bill is to be tested, not by the mere immediate pecuniary damage resulting from the acts complained of, but by the value of the business to be protected and the rights of property which the complainant sought to have recognized and enforced."

Respectfully submitted,

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PHILLIP W. HABERMAN,
DUANE R. DILLS,
ANTHONY J. RUSSO,
STANLEY B. ECKER,
PAUL Y. DAVIS,
*Counsel for Appellee.*

April 3, 1936.

NOTE: Copies of this Memorandum have been mailed to counsel for Appellants. Although it has no bearing on the subject matter of this Memorandum the attention of the Court is respectfully directed to the typographical error which appears in Paragraph Eighth of the McHenry Complaint (McHenry Record p. 4, 9th line at the top of the page) where "Article 4 of the Constitution of the State of Indiana" is referred to—instead of Section 1 of Article 3. The Complaint in the G. M. A. C. case correctly refers to the Section in question (G. M. A. C. Record p. 3; Article Sixth of Complaint),—and the briefs filed in the lower court as well as the brief filed on this appeal make correct reference to the Article of the Constitution of Indiana which is set forth at length in the Appendix to the brief (p. 58).